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No. 83-918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DALE M. CARTER,

Appellant,

v.

STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR AFFIRM

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The Appellee, STATE OF ILLINOIS, respectfully moves this Court to dismiss this appeal on the following grounds:

1. The appeal is not within this Court's jurisdiction;
2. The appeal does not present a substantial federal question;
3. The appellant seeks review of questions not properly raised before and expressly passed upon by the Illinois Supreme Court.

In the alternative, the Appellee moves this Court to affirm the judgment of the Supreme Court of Illinois, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED BECAUSE THIS COURT DOES NOT HAVE JURISDICTION OVER APPELLANT'S CHALLENGE TO THE CONSTITUTIONALITY OF SECTION 12 OF THE ILLINOIS FRANCHISE DISCLOSURE ACT.

Appellant was convicted, on counts I, II and IV of the indictment, of violating: sections 4(1) and 16 of the Illinois Franchise Disclosure Act (the Act), in that he sold an unregistered franchise; section 4(2) of the Act, in that he failed to provide a disclosure statement to the prospective franchisee prior to sale; and section 16.1 of the Act, in that he failed to register franchise salespersons. Ill. Rev. Stat. 1981, ch. 121½, ¶¶ 704, 716, 716.1. In the state courts, he made no attack on the constitutionality of those provisions, but sought a reversal of his conviction by alleging the facial unconstitutionality of section 12 of the Act. Ill. Rev. Stat. 1981, ch. 121½, ¶ 712. That section authorizes the Attorney General, as Administrator of the Act, to grant exemptions from certain of its requirements. Rule 206 of the General Rules and Regulations Under the Franchise Disclosure Act outlines the application procedure for an order of exemption. It is undisputed that appellant never applied for a section 12 exemption.

The Illinois Supreme Court acknowledged the State's argument that appellant lacked standing to attack the validity of section 12 and conceded that "this contention [was] not entirely without merit . . . ." *People v. Carter*, 97 Ill. 2d 133, 454 N.E.2d 189, 190 (1982). Nonetheless, that Court, in the exercise of its discretion, elected to decide the constitutional question presented. That deci-

sion cannot, however, preserve for review the federal questions which plaintiff seeks to raise before this Court on Fourteenth Amendment grounds.

Justice Rehnquist, in denying an application for bail pending certiorari in *Bateman v. Arizona*, 429 U.S. 1302, 1305 (1976), explained that:

> [t]he courts of a State are free to follow their own jurisprudence as to who may raise a federal constitutional question, but this Court in reviewing a state-court judgment is bound by the requirements of case and controversy and standing associated with Art. III of the United States Constitution.

Thus, he deemed it unlikely that the full Court would accept Bateman's challenge to the constitutionality of a state statute which had been construed to prohibit certain sexual acts between consenting adults, when Bateman had been convicted of nonconsensual conduct. Similar reasoning had in fact resulted in dismissal of the appeal in *Doremus v. Board of Education*, 342 U.S. 429 (1952), and directs the proper result in the instant case as well.

Having declined to seek an exemption under section 12, the appellant was obliged to comply with the requirements of the Act and was properly convicted of his failure to do so. He is without standing to mount a theoretical challenge to the basis upon which exemption decisions may be made, because his possible entitlement to an exemption never became an issue. Appellant's attack on section 12 presents no case or controversy to this Court, which, consequently, is without jurisdiction to decide whether the Illinois Supreme Court erred in finding that statute to be constitutional.

II.

SECTION 12 OF THE ACT, AUTHORIZING THE ADMINISTRATOR TO GRANT EXEMPTIONS FROM REGISTRATION AND DISCLOSURE REQUIREMENTS, DOES NOT VIOLATE FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

Appellant mischaracterizes section 12 as a statute granting the Attorney General "unmitigated" power "to amend or repeal the statute at will" and premises his allegations of constitutional violations upon that mischaracterization. Section 12, as authoritatively construed by the Illinois Supreme Court, does not authorize administration of the Act in an arbitrary manner. Thus, even assuming that appellant had raised a justiciable case or controversy to this Court, his attacks on section 12 do not present a substantial federal question. His appeal should, therefore, be dismissed, or the Illinois Court's decision should be affirmed. *Sugarman v. United States*, 249 U.S. 182 (1919).

Under section 4(1) of the Act, "[i]t is unlawful for any franchise to be offered for sale or sold in this state by any person who is subject to this Act and is not first registered pursuant to Section 16.1 unless exempt from registration." Ill. Rev. Stat. 1981, ch. 121½, ¶ 704(1). Section 12 authorizes the Attorney General, as Administrator of the Act, to grant, subject to such terms and conditions as he may prescribe, exemptions from the filing and registration requirements of the Act, "if he finds that the enforcement of [the] Act is not necessary in the public interest . . . ." Ill. Rev. Stat. 1981, ch. 121½, ¶ 712.

Observing that "the purposes of the Act are to protect the investments of people buying franchises and to insure that before entering into a franchise agreement [investors] are fully informed of the franchisor's financial condition,"

the Illinois Supreme Court found that these purposes provided a context for the "public interest" criterion under which the Attorney General might grant a section 12 exemption. *People v. Carter*, 97 Ill. 2d 133, 454 N.E.2d 189, 191 (1982). This finding was consistent with the ruling in *American Power & Light Co. v. Securities & Exchange Commission*, 329 U.S. 90 (1946), where this Court explained that standards for delegation of authority to an administrative agency should not be evaluated in isolation, but must be examined in light of the purpose of the Act in which they appear, their statutory context, and the factual background of the enactment. Indeed, this Court had applied those very standards to uphold a delegation of authority to the Interstate Commerce Commission, where the stated criterion for exercise of that authority was the "public interest." *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24 (1932).

Because the information needed to accomplish the Act's goals might be otherwise readily available to potential franchisees or subfranchisors, the Illinois court noted that under such circumstances, the Attorney General could indeed find it unnecessary to enforce the registration requirements with respect to a particular franchisor. Thus, the "public interest" standard was found to be an intelligible one; it authorized the Attorney General to grant an exemption where a potential franchisee or subfranchisor would already have available, from other public sources, the same information which the Act's registration and disclosure requirements would have provided to him. This construction of section 12 by the state court fixed the meaning of that statute for the purposes of this case, as definitely as if the General Assembly had specified the interpretation. *Winters v. New York*, 333 U.S. 507, 514 (1948). Given this authoritative statement of the Illinois

court, the statute easily survives plaintiff's constitutional challenges.

The Act is readily identifiable as an example of local economic regulation.* In *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), this Court stated the rule for reviewing an equal protection challenge to such an act:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. (citation omitted).

The Act sets forth registration requirements applicable to all franchisors and entitles all of them to seek exemptions from registration and disclosure requirements. The only "classification" authorized by section 12 is the distinction between those applicants who will receive an exemption and those who will not. That distinction will be controlled by an eminently reasonable test: an exemption may be granted when the information which would otherwise be required in the form of disclosure and registration is already available to those whom the Act would seek to protect by providing that information. In other words, where registration is not necessary to achieve the Act's purposes, as reiterated by the Illinois Supreme Court, an exemption is appropriate.

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* The imposition of criminal penalties for failure to comply with the requirements of such a statute does not exclude it from being characterized as a type of economic regulation. *See Ferguson v. Skrupa*, 372 U.S. 726 (1963).

The classification made between those who will receive an exemption and those whose request will be denied is rationally related to the state interest of protecting potential franchisees, an interest whose legitimacy has never been questioned in these proceedings. No fundamental right is implicated by the Attorney General's decision to grant or deny an exemption, as there is no criminal sanction for the failure to seek or gain such an exemption. A would-be franchisor is not threatened with a deprivation of personal liberty on the basis of a refused exemption; he is simply obliged to comply with the requirements of the Act, due to a rational distinction between his situation and those of exempted franchisors.

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), relied upon by appellant in support of his Due Process and Equal Protection claims, this Court examined ordinances which were found to confer upon certain local government officials "not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent . . . ." 118 U.S. at 366. Although that case was disposed of on equal protection grounds, it has come to be recognized that legislation permitting arbitrary governmental action implicates substantive due process rights. *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977). However, as this Court has stated, "[i]f the laws passed [by a State] are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . ." *Nebbia v. New York*, 291 U.S. 502, 537 (1934). Under this test, which is reminiscent of that applicable to equal protection cases, section 12 easily survives appellant's due process challenge. Section 12's "public interest" criterion provides an adequate basis for

the exercise of the Attorney General's discretion and does not permit the arbitrary action which would run afoul of the Due Process Clause. Moreover, the Act unquestionably has a reasonable relation to the legislative purpose of protecting Illinois investors, a purpose which, as previously noted, is not challenged by the appellant.

It is unnecessary for this Court to require briefs on the merits of the issues raised by the appellant, as the constitutional challenges he makes to section 12 of the Act are insubstantial. Therefore, this appeal should be dismissed or, alternatively, the decision from which the appeal is taken should be summarily affirmed.

III.

APPELLANT HAS WAIVED THE SECOND AND THIRD QUESTIONS WHICH HE HAS RAISED TO THIS COURT.

This Court has consistently refused to decide federal constitutional issues which were not raised in and passed upon by the courts below. *Tacon v. Arizona*, 410 U.S. 351 (1973); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). This rule is applicable to the second and third questions raised by appellant in his Jurisdictional Statement. He cannot rely on those points to urge reversal of the decision of the Illinois Supreme Court.

In question #2, appellant requests a determination that certain language in section 32 of the Act, Ill. Rev. Stat. 1981, ch. 121½, ¶ 732, renders the criminal provisions of the Act unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Section 32 vests the Attorney General with discretion to withhold from public inspection documents which he has received under the Act when, in his judgment, such disclosure is not necessary in the public interest or for the

protection of franchisees or subfranchisors. Information withheld is, however, made subject to disclosure "when necessary or appropriate in a proceeding or investigation under this Act or to other federal or state regulatory agencies." Ill. Rev. Stat. 1981, ch. 121½, ¶ 732.

The opinion of the Illinois Supreme Court makes no reference whatsoever to section 32. Indeed, the appellant never argued to that court that the language of section 32 demonstrated the Act's alleged unconstitutionality under the Fourteenth Amendment. Examination of appellant's state supreme court brief, at the pages referenced on page 4 of his Jurisdictional Statement, reveals no reference to section 32 in connection with any federal constitutional claims. In fact, appellant cited section 32 only in his separation of powers argument—an argument predicated upon state law grounds, as appellant expressly acknowledged at page 25 of that brief. Clearly, the federal question which he now frames with respect to section 32 was neither raised in nor passed upon by the state court from which he appeals.

Appellant's third question to this Court seeks a determination that section 6 of the Act, Ill. Rev. Stat. 1981, ch. 121½, ¶ 706, is void for vagueness, invoking the rule that a statute is void on its face, as violative of due process, if it is so vague and indefinite as to permit punishment of protected behavior. *See, Winters v. New York*, 333 U.S. 507 (1948); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). As was true of the second question, appellant's third issue is not properly raised before this Court as it was not passed upon in the Illinois courts. The appellate court specifically declined to address the void-for-vagueness question, while the supreme court addressed only the sufficiency of the charge contained in Count III of the indictment. Far from having preserved this issue for

review, appellant acknowledged, in the Illinois Supreme Court, that the pertinent section 6 language was "good on its face." Ill. Sup. Ct. Brief for Appellee at 40.

In a federal system, it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of a constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). For this reason, it would be inappropriate for this Court to consider appellant's belated challenge to the constitutionality of section 6 of the Act.

Finally, the State recognizes that appellant's third question also raises the alleged unconstitutionality of Count III of the indictment. It must be observed, however, that despite this Court's requirement in Supreme Court Rule 15(1)(h) that a Jurisdictional Statement include a statement of reasons why the questions presented are so substantial as to mandate plenary consideration, appellant's Jurisdictional Statement offers no such reasons with reference to Count III. Instead, he confines himself to the briefest possible summary of Justice Moran's dissenting opinion, where that Justice found a portion of section 6 to be invalid due to vagueness. From his reticence, it is obvious that appellant recognizes that his third question to this Court reflects no substantial question properly preserved for review. His appeal should be dismissed on that basis.

CONCLUSION

For the foregoing reasons, the appellee, STATE OF ILLINOIS, moves for dismissal of this appeal, or in the alternative, for affirmance of the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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